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No. 1368

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

OSCAR LEE BELVINS, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

BILLY L. EVANS
107 Persons Building
Macon, Georgia 31201
Attorney for Petitioner

Petitioner, OSCAR LEE BELVINS, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 19, 1968, affirming his conviction of possessing an unregistered distilling apparatus, in violation of 26 U.S.C.A,. Sections 5179 (a) and 5601 (a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered on March 19, 1968 is unreported to date, but is reproduced in Appendix "A" to this petition.

JURISDICTION

Petitioner did not apply for rehearing by the United States Court of Appeals for the Fifth Circuit, thus there has been no order passed respecting a rehearing. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

Petitioner was arrested and charged with a crime in the Americus Division of the United States District Court for the Middle District of Georgia. He was brought to trial in the Macon Division of said Court and a jury was selected from a panel of jurors from the Macon Division.

In making his closing statement to the jury, the District Attorney argued to the jury that their duty was higher in this case because they, as a Macon Division jury, were passing on a case from the Americus Division and were thus representing the people from the Americus Division.

A request was made by petitioner's counsel after the close of the District Attorney's statement and the charge of the Court to have the Court clarify the reasons for trying an Americus Division case in the Macon Division. The District Court Judge failed to do so and the United States Court of Appeals for the Fifth Circuit affirmed the conviction, stating that the argument to the jury was not erroneous.

1. Does argument on the part of the District Attorney to a jury impaneled in one division of a District Court trying a case from another division of the District Court to the effect that their duty is higher because of this particular status constitute erroneous argument?

2. Whether the District Court, by allowing such argument and by failing upon request of petitioner's counsel to clarify the status of the jury in such a situation, so far departed from the accepted and usual course of judicial proceedings as to commit erroneous error, necessitating an exercise of this Court's power of supervision.

3. Whether the United States Court of Appeals for the Fifth Circuit, in affirming the decision of the District Court, sanctioned so far a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Petitioner was convicted of possessing an unregistered distilling apparatus, in violation of 26 U.S.C.A., Sections 5179-(a) and 5601 (a). These statutes are not relevant to

the questions petitioner is raising as reason for this petition for Writ of Certiorari and are, therefore, not being set out. The question involved appears to be one of first impression, and there appears to be no constitutional or statutory provisions involved. Rule 19 of the Supreme Court of the United States, setting out the considerations governing review on certiorari, applies in part in that said Rule provides that a reason for this Court granting a review on writ of certiorari includes a situation where a Court of Appeals ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

CONCISE STATEMENT OF CASE

Petitioner, accused of violating Federal Criminal Statutes within the jurisdiction of the Americus Division of the United States District Court for the Middle District of Georgia, was tried by jury in the Macon Division of said Court. The District Attorney argued to the jury that they had a higher duty in this case than they would normally have because they were to pass on an Americus Division case (R-57).

Petitioner's attorney made no objection to this argument until after the conclusion of the Court's charge to the jury, at which time he asked the Court to clarify to the jury why an Americus Division case was being tried in the Macon Division of said Court. This was not done (R-79, 80).

The jury list in the Macon Division of said Court had just been revised and the jury impaneled to hear petition-

er's case, with the exception of one juror, had never served on a jury of any nature (R-59).

REASON FOR GRANTING WRIT

The present case indirectly involves petitioner's right under the Sixth Amendment to the United States Constitution which guarantees to him a ". . . speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,". This possibility can be readily seen by considering the make-up of the jury which was impaneled to try petitioner, and the possible affect of the Attorney General's argument as heretofore complained of.

Normally a jury consists of several members who have previously served on a jury. In the present case, as heretofore pointed out, the jury consisted of eleven members who had never served on a jury and one member who had served on a jury but not in the Federal Court. Even with experienced jurors, it is impossible to tell what one thing influences a jury to decide a certain way and in the present case, this uncertainty is greatly magnified.

Under this set of circumstances, the District Attorney was allowed to tell the jury that "It's a high duty and a privilege to be a juror. And in this situation the duty is higher, because you are here to pass on a case, not in the Macon Division although you are a Macon Division jury, but you're here to pass on a case from the Americus Division." (R-57). This statement, without clarification on the part of the trial Judge as requested by petitioner's counsel, implied to the jury that they had a duty to the people of the Americus Division to convict petitioner. By

allowing such argument without clarification, petitioner was deprived of his Constitutional right to a trial by an impartial jury, the jury having been prejudiced against him by the erroneous argument of the District Attorney.

In view of the situation as heretofore set out, the argument of the District Attorney must be erroneous. There is no greater duty on a jury trying a case from another jurisdiction than there is on a jury trying a case in their own jurisdiction. Argument to the effect that there is greater duty in such a situation, without clarification by the Court when requested, could very possibly have caused the jury to find the petitioner guilty even though a reasonable doubt existed in their mind.

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the conviction of petitioner in view of such argument, undoubtedly sanctioned a departure from the accepted and usual course of judicial proceedings on the part of the District Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted.

BILLY L. EVANS
Attorney for Petitioner

APPENDIX "A"

DECISION BELOW

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24,783

OSCAR LEE BELVINS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(March 19, 1968.)

Before WISDOM, BELL and DYER, Circuit Judges.

PER CURIAM: Appellant was convicted of possessing an an unregistered distilling apparatus in violation of 26 U.S.C.A., §§5179 (a) and 5601 (a).

The record discloses that the errors assigned are without merit. The evidence was sufficient to withstand appellant's motion for a directed verdict of acquittal. The argument of the prosecutor was not improper. The court did not err in charging the jury on aiding and abetting or in the comment to the jury concerning the absent participants in the distillery operation.

AFFIRMED.

JUDGMENT BELOW

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 19, 1968

Issued as Mandate: April 10, 1968

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

OSCAR LEE BELVINS, Petitioner

vs.

UNITED STATES OF AMERICA

TO: THE SOLICITOR GENERAL OF
THE UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON 25, D.C.

You are hereby notified that the petition for Writ of Certiorari in the above entitled and numbered case was filed in the Supreme Court of the United States on the 29th day of April, 1968.

The record, filed pursuant to the requirement of Rule 21 (1) consists of the record of the decision of the United States Court of Appeals for the Fifth Circuit, and in addition, nine copies of the record as permitted by Rule 21 (4).

BILLY E. EVANS
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1368

OSCAR LEE BELVINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Middle District of Georgia of having possession, custody, and control of an unregistered still in violation of 26 U.S.C. 5601 (a).[1] He was sentenced to imprisonment for a year and a day. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioner does not question the sufficiency of the evidence. His only contention is that the prosecutor exceeded the bounds of argument in his closing summation. The distillery which petitioner operated was located in the Americus Division of the Middle District of Georgia and the indictment was returned by a

[1] The jury acquitted petitioner on three other counts.

grand jury sitting in that Division. The case was tried, however, in the Macon Division of that District. In his closing argument, government counsel stated (I.R. 57):

> Now, the jury is a great system. One of the regrets of my life is that I can never serve, that I'll never be able to serve on the jury. I wish that I could. It's a high duty and a privilege to be a juror. And in this situation the duty is higher, because you are here to pass on a case, not in the Macon Division although you are a Macon Division jury, but you're here to pass on a case from the Americus division. You have to do your duty, not only to yourselves and the Defendant and the Government and the people of this Division, but for the Americus Division.

No objection was made to the argument. In requesting exceptions to the court's instructions, defense counsel asked "* * * whether or not there was any reason why [it] should be clarified as to why this case was being tried here instead of down at Americus" (I R. 79). The trial judge indicated that he would let the instructions stand as given and no further objection was made.

In these circumstances, the court of appeals properly declined to find reversible error in the reference to the Americus Division. In context, the rhetoric merely emphasized to the jury their duty—to both the government and the defendant—to base their verdict on the evidence presented at trial. Petitioner's suggestion that the argument improperly prejudiced him in the eyes of the jury ignores the overwhelming evi-

dence showing his connection with the illegal distilling operation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MAY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968